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LETTER DATED 5 APRIL 1993 FROM THE PERMANENT REPRESENTATIVE OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

Resolution 808 (1993) requested the Secretary-General to submit a report to the Security Council containing options for the charter of an international tribunal for prosecution of persons responsible for violations of international humanitarian law in the former Yugoslavia, taking into account suggestions put forward by Member States.

Following consultations with your office, I have the honour to forward herewith for consideration by you in the preparation of this report, the United States Government's views and proposals. We hope that our submission proves helpful to you.

I would appreciate it if you would have this paper circulated as a document of the Security Council.

(Signed) Madeleine K. ALBRIGHT

Annex I

Creation of an international tribunal for violations of international humanitarian law in the former Yugoslavia

Pursuant to Security Council resolution 808 (1993), the United States offers the following views and proposals for the creation of an international tribunal for the prosecution of persons responsible for violations of international humanitarian law in the former Yugoslavia.

In our view, the Tribunal should be established by the international community to enforce international standards. The Security Council has the authority under Chapter VII of the Charter of the United Nations to create such a tribunal, and is the appropriate body to do so. The process should not be limited to a single regional group. The Tribunal should apply substantive and procedural law that is internationally accepted.

The Tribunal must be fair and be seen as fair. It must therefore respect basic norms of due process, including: an impartial and independent trial court; a prosecutorial authority independent from the trial court; the participation of defendants in their own defence; the right to appeal to an independent appellate panel; and the observance of fundamental rights of defendants, including the right to counsel, to public proceedings, to cross-examine witnesses and to present evidence.

Finally, the process for establishing the tribunal should be designed to bring it into existence at an early date. The Security Council is in a position to do so in accordance with the procedure set forth in resolution 808 (1993). The alternative of establishing a tribunal by treaty would, in our view, be much less effective and take much more time. This alternative would require a lengthy process of negotiation, conclusion and ratification; and it might lead to the absence of important States at the time the tribunal begins its work.

Accordingly, we propose that the following specific steps be taken in establishing the tribunal:

1. The Security Council should consider the recommendations to be made by the Secretary-General pursuant to resolution 808 (1993). It should adopt a resolution under Chapter VII that would formally establish the tribunal and approve its charter.

2. The charter should contain the essential elements of the organization and operation of the tribunal, such as: its composition; the scope of its jurisdiction; the basic procedure for indictment, trial and appeal; the rights of defendants; and the enforcement of its decisions. (A proposed draft charter is attached.) Procedural details would be left to a set of rules to be adopted at a later date. It would be important to develop rules that are fair and that provide appropriate protection for victims who are providing evidence to the tribunal.

3. The Security Council resolution establishing the tribunal should require that States endeavour to take any necessary measures, including the adoption of domestic legislation or the conclusion of subsidiary treaty arrangements, to permit them to comply fully with orders of the tribunal, including those for the surrender of accused persons, the production of evidence and the taking of testimony. The resolution should also require States to provide reasonable assistance to other States in complying with orders of the tribunal.

4. The Security Council should create a subordinate body, comprised of the members of the Security Council, to be known as the Administrative Council. This body would, among other things, exercise general administrative control over the staffing and operations of the Chief Prosecutor and the tribunal, and approve recommendations for financing the tribunal's operations. Such financing should be provided through regular United Nations assessments.

Annex II

Draft charter of the international tribunal for violations of international humanitarian law in the former Yugoslavia

I

ORGANIZATION

A. Tribunal

Article 1. The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia (hereinafter referred to as the "Tribunal") is established for the purpose of the just and prompt trial of persons accused of violations of international humanitarian law, as set forth in article 10, committed in the territory of the former Yugoslavia on or after 1 January 1991.

Article 2. The Tribunal shall consist of a Trial Court and an Appeals Court.

(a) The Trial Court shall consist of nine members, who shall preside over trials in panels of three members each. The members of the Trial Court shall by majority vote select from among themselves a Chief Judge of the Trial Court, who shall be an experienced jurist. He or she shall have such administrative responsibilities as the members of the Trial Court shall decide.

(b) The Appeals Court shall consist of nine members, who shall preside over appeals in panels of three judges each. The Appeals Court may consider particular appeals in panels of more than three judges where it determines that this is warranted by the importance of the issues involved or other special circumstances. The members of the Appeals Court shall by majority vote select a Chief Judge of the Appeals Court and the Tribunal from among themselves, who shall be an experienced jurist. He or she shall have such administrative responsibilities as the members of the Appeals Court shall decide.

Article 3

(a) Each member of the Tribunal shall be a person of high moral character and shall have the legal competence and qualifications required for appointment to a criminal court of the State in which that member is resident or of which that member is a national, including preferably experience in the conduct of criminal trials or appeals.

(b) Members of the Tribunal shall be appointed for a term of ___ years, and may only be removed for appropriate cause by the Security Council, which may also appoint alternate Trial Court and Appeals Court judges to serve in the event of disability, recusal or removal of a member of the Tribunal.

(c) The Rules to be adopted pursuant to article 6 shall make provision for the recusal or removal of Tribunal members in particular cases, and for their replacement by alternates, when appropriate.

(d) Except where otherwise provided herein, decisions of the Tribunal shall be made by majority vote of the panel presiding over a trial or appeal.

Article 4. The Tribunal is authorized to establish a Registry and other subsidiary bodies and appoint personnel as it deems necessary to assist it in the performance of its functions.

Article 5. The Tribunal shall have such powers as are necessary and appropriate for the conduct of criminal trials and appeals, including the power:

(a) To issue arrest warrants;

(b) To summon witnesses, to require their attendance and testimony and to put questions to any witness, including the accused person should he testify;

(c) To require the production of documents and other evidentiary materials;

(d) To administer oaths to witnesses;

(e) To conduct or authorize appropriate proceedings, including the taking of evidence on commission.

Article 6. The Tribunal shall, with the approval of the Security Council, adopt Rules of Procedure for the conduct of trials and appeals, the admission of evidence, the protection of witnesses and other sources of information, and other appropriate matters, as well as sentencing guidelines.

Article 7. The Tribunal shall have its seat at _____. This shall not prevent the Tribunal from sitting and exercising its powers elsewhere if it deems appropriate. Subject to the approval of the Security Council, the Secretary-General shall conclude at the earliest possible date an agreement with the Government of _____, and other States as appropriate, concerning the location and operation of Tribunal headquarters; privileges and immunities appropriate for their functions to be accorded to members and personnel of the Tribunal, the Registry and the Office of the Chief Prosecutor, and to counsel of accused persons; the incarceration of accused persons; the protection of witnesses during proceedings, and other relevant matters.

B. The Office of the Chief Prosecutor

Article 8. The Office of the Chief Prosecutor shall be responsible for the investigation and prosecution of defendants before the Tribunal. The Chief Prosecutor:

(a) Shall be a person qualified to perform, and with significant experience in the conduct of, investigations and prosecutions of major criminal cases in the State in which he or she is resident or of which he or she is a national;

(b) Shall be appointed by, report to, and be removable at the discretion of, the Security Council.

Article 9. The Chief Prosecutor is authorized to:

(a) Investigate allegations of violations set forth in article 10 and to collect and preserve evidence relating to those violations;

(b) Request warrants of arrest pursuant to article 14;

(c) Request States to arrest, detain and transfer accused persons pursuant to article 15;

(d) Request assistance from States, including but not limited to the provision of evidence, the identification and location of persons, the taking of testimony and the serving of Tribunal documents;

(e) Issue indictments and accompanying documents. The indictment shall include full particulars specifying in detail the charges against the accused person. A copy of the indictment and of all the documents lodged with the indictment, translated into a language that he or she understands, shall be furnished to the accused person as provided in article 17;

(f) Conduct examinations of witnesses and accused persons, consistent with the rights contained in article 20;

(g) Prosecute individuals against whom indictments have been issued;

(h) Appoint subordinates to carry out such duties as may be assigned to them;

(i) Perform such other acts and functions as may be necessary and appropriate for the purposes of investigation, indictment and prosecution in accordance with this Charter.

II

JURISDICTION AND GENERAL PRINCIPLES

Article 10. The Tribunal shall have the power to try and to punish persons for any of the following violations of international law arising out of the conflict in the former Yugoslavia on or after 1 January 1991:

(a) Violations of the laws or customs of war, including the regulations annexed to the Hague Convention IV of 1907 and grave breaches of the Geneva Conventions of 12 August 1949. For this purpose, the conflict in the former Yugoslavia on or after 25 June 1991 shall be deemed to be of an international character;

(b) (i) Acts of murder, torture, extrajudicial and summary execution, illegal detention and rape that are part of a campaign or attack against any civilian population in the former Yugoslavia on national, racial, ethnic or religious grounds;

(ii) Acts that violate the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

Article 11. There shall be individual responsibility for the violations set forth in article 10.

(a) The fact that an accused person acted pursuant to order of his or her Government or of a superior shall not free him or her from responsibility, unless the accused person did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defence, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

(b) An accused person with military or political authority or responsibility is individually responsible if violations described in article 10 were committed in pursuance of his or her order, directive or policy. An accused person is also individually responsible if he or she had actual knowledge, or had reason to know, through reports to the accused person or through other means, that troops or other persons subject to his or her control were about to commit or had committed such violations, and the accused person failed to take necessary and reasonable steps to prevent such violations or to punish those committing such violations.

(c) The official position of an accused person, including as a Head of State or a responsible official in a Government, shall not be considered as freeing him or her from responsibility or grounds for mitigating punishment.

(d) Those who conspired to commit or who were accomplices to any of the violations in article 10 are individually responsible for such violations.

Article 12

(a) The fact that a person has been detained, tried, acquitted or punished by a State or States shall not preclude the detention, trial or punishment of that person by the Tribunal for the same acts if the Tribunal determines that there were violations of this Charter not comprehended in the prior prosecution or that the prior prosecution was not diligently prosecuted before an impartial tribunal. In considering the punishment of such a person, the Tribunal shall take fully into account any punishment of that person by a national court for the same acts.

(b) The Tribunal may, at its discretion, defer to the prosecution of an accused person by a State or States, when it is satisfied that such trial will be in the interests of justice and without prejudice to its authority under paragraph (a). The Office of the Chief Prosecutor may also assist in the investigation and prosecution of persons by a State or States.

Article 13. The Tribunal shall not initiate the trial of a person charged with violations under this Charter in his or her absence.

III

APPREHENSION AND DETENTION OF ACCUSED PERSONS AND LEGAL ASSISTANCE

Article 14

(a) At the request of the Chief Prosecutor, the Trial Court shall issue warrants of arrest for an accused person, upon a finding that there is a reasonable basis to believe that he or she has committed a violation as set forth in article 10.

(b) From the time of coming into the custody of the Tribunal, accused persons shall have the right, which they may waive:

- Not to be compelled to testify against themselves or to confess guilt and to be informed of this right;

- To legal assistance; to have legal assistance assigned to them, without payment by them in any such case if they do not have sufficient means to pay for it; and to be informed of this right.

Article 15. Upon presentation of a warrant of arrest and supporting documentation by the Chief Prosecutor that there is a reasonable basis to believe that he or she has committed a violation as set forth in article 10, a State shall arrest, detain and transfer persons identified in the warrant and in its custody or found within its territory to the custody of the Tribunal.

Article 16

(a) Upon receiving an order of the Tribunal pursuant to article 5 for the production of evidence, the identification and location of persons, the taking of testimony and the service of Tribunal documents, a State shall provide the assistance ordered by the Tribunal.

(b) States shall give prompt consideration to other requests for assistance by the Chief Prosecutor pursuant to article 9.

Article 17

(a) Without delay after an accused person comes into the custody of the Tribunal, there shall be a hearing at which an indictment shall be presented to the Trial Court and to the accused person.

(b) The accused person shall have the right to give an explanation relevant to the charges made against him or her and to enter a plea.

(c) After this hearing, the Trial Court shall decide whether there is reasonable cause to hold the accused person over for trial.

Article 18. The Trial Court has the authority to order pre-trial detention or to grant conditional release. Any such detention shall be in a State chosen

by the Tribunal from a list of States that have agreed to detain persons for this purpose.

Article 19. The Trial Court shall ensure fair and expeditious hearings of all matters before it. To that end, it shall:

(a) Confine the trial to the issues raised by the indictment;

(b) Impose appropriate restrictions or punishment on participants in proceedings before the Trial Court for violation of decorum or refusal to comply with the rules and orders of the Trial Court.

IV

RIGHTS OF THE ACCUSED PERSON AFTER PRELIMINARY HEARING

Article 20. Accused persons shall be presumed innocent until proved guilty beyond a reasonable doubt in a public trial. From the time of the Trial Court's decision to hold the accused person over for trial under article 17 (c), each accused person shall have the rights guaranteed under international law and by this Charter, including the right:

(a) To be informed promptly and in detail, in a language which the accused person understands, of the nature and cause of the accusation against him or her;

(b) To be informed of the evidence supporting the accusation against him or her, and to be provided any exculpatory evidence in the possession of the Chief Prosecutor;

(c) To have adequate time and facilities for the preparation of a defence and communication with defence counsel;

(d) To be tried without undue delay;

(e) To be tried in his or her presence, and to defend him- or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(f) To examine or have examined witnesses against the accused person and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(g) To have the free assistance of an interpreter at all phases of the proceedings against him or her if the accused person cannot understand or speak the language used in court;

(h) Not to be compelled to testify against him- or herself or to confess guilt and not to have his or her failure to make any statement or explanation used against him or her;

(i) To appeal the judgement and sentence of the Trial Court in accordance with article 24 of this Charter.

V

JUDGEMENT AND SENTENCING

Article 21. The Trial Court shall have the power to sentence convicted persons to imprisonment or other appropriate punishment.

Article 22. Imprisonment shall be in a State chosen by the Trial Court from a list of States that have agreed to imprison persons for this purpose.

Article 23. Complaints about the conditions of imprisonment shall be made to national authorities or to the Tribunal and, after it has ceased operations, to the Security Council.

VI

APPEALS

Article 24

(a) Upon written notice filed within 30 days of the date of entry of judgement, a convicted person shall have the right to appeal to the Appeals Court a conviction on the grounds that the Trial Court committed an error of law invalidating the decision, or an error of fact that caused a manifest miscarriage of justice.

(b) An application for reversal of a conviction may also be made to the Appeals Court, or, if the Tribunal has ceased operating, to the Security Council, upon discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Court and to the convicted person. The application for reversal of conviction must be made within six months of discovery of the new fact.

(c) The Rules adopted pursuant to article 6 may also provide for interlocutory appeals by the accused person or Chief Prosecutor of other matters.

Article 25. After the convicted person's appeal is exhausted, or if the convicted person elects not to exercise the right to appeal, the convicted person may seek clemency or commutation of his sentence from the Security Council.